

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PLANET STAGE PRODUCTIONS, LLC
d/b/a PLANET STAGE,

Plaintiff,

vs.

Case No. 2014-2758-CK

MASONIC TEMPLE ASSOCIATION OF
DETROIT, INC., 450 TEMPLE Inc.,
MICHAEL SMITH, and MATTHEW MAZUR,

Defendants.

OPINION AND ORDER

Defendant Michael Smith has filed a motion for partial summary disposition of Plaintiff's claims against him pursuant to MCR 2.116(C)(8). Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

This action arises out of a dispute over withheld ticket revenue from Plaintiff's concert event held at Detroit Masonic Temple Association of Detroit, Inc. ("Defendant Temple") and Detroit 450 Temple, Inc.'s ("Defendant 450")(Defendant Temple and Defendant 450 collectively as, "Temple Defendants") venue in Detroit, Michigan on November 23, 2012.

Defendant Michael Smith ("Defendant Smith") is/was the president of the Detroit Masonic Temple Theatre Company ("DMTTC"), the entity that conducted the Temple Defendants' management affairs. The written contract underlying the instant matter was between Plaintiff and DMTTC.

Prior to the event taking place, DMTTC and the Temple Defendants allegedly had a falling out. Approximately two weeks before the event the Temple Defendants' president advised Plaintiff of the falling out but allegedly reassured Plaintiff that its event would not be affected. While the event was held as scheduled Plaintiff has allegedly not received \$81,227.25 in ticket sale revenues that it alleges it is entitled to.

On July 15, 2014, Plaintiff filed its complaint in the instant matter asserting claims for: Breach of Contract (Count I), Common Law Conversion (Count II), Statutory Conversion (Count III), Gross Negligence (Count IV), Negligence (Count V), Fraudulent Misrepresentation (Count VI), and Unjust Enrichment (Count VII). On October 30, 2014, Defendant Smith filed his instant motion for partial summary disposition of Plaintiff's claims. Specifically, Defendant Smith seeks summary disposition of Plaintiff's Counts II thru VII to the extent they are brought against him. Plaintiff has since filed a response and requests that the motion be denied. On December 1, 2014, the Court held a hearing in connection with the motion and took the matter under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments made at the hearing, and is now prepared to render its decision.

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439

Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

Arguments and Analysis

1) Counts II and III- Common Law and Statutory Conversion

In its complaint, and in support of its conversion claims, Plaintiff alleges that Defendants committed conversion by knowingly and willfully taking continual possession of Plaintiff's ticket revenue without its knowledge, consent or permission and/or receiving, obtaining, concealing, secreting and/or converting or aiding in the concealment of the ticket revenue. (See Complaint, at ¶63-64.)

“Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.” *Citizens Ins Co of America v Delcamp Truck Center, Inc.*, 178 Mich App 570, 575; 444 NW2d 210(1989), quoting *Nelson & Witt v Texas Co*, 256 Mich 65, 70; 239 NW 289 (1931). *Citizens* involved defendant's improper retention/refusal to turn over of the excess proceeds of a check where it was only entitled to retain a portion of the proceeds. In holding that the plaintiff could maintain a conversion claim against the defendant, as well as its agents, the Court provided:

Conversion is an intentional tort in that the defendant's action must be willful, but one can commit the tort unwittingly if unaware of the plaintiff's outstanding property interest. *Warren Tool Co v Stephenson*, 11 Mich App 274, 299, 161 NW2d 133 (1968). Although an action cannot be maintained for conversion of money unless there is an obligation on the part of the defendant to return the specific money entrusted to his care, *Garras v Bekiares*, 315 Mich 141, 148, 23 NW2d 239 (1946), it is not necessary that the money should be specifically earmarked for its return. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship. See *Hogue v Wells*, 180 Mich 19, 24, 146 NW 369 (1914); 89 C.J.S., Trover and Conversion, § 23, p. 541. Conversion may be committed by the refusal to surrender a chattel on demand. *Thoma v. Tracy Motor Sales, Inc*, 360 Mich. 434, 438, 104 N.W.2d 360 (1960).

An action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount. *Hogue, supra*. In this case, [defendant], converted [plaintiff's] personal property when it cashed [plaintiff's] check and retained the full amount of that check when it was entitled to only a portion of the full amount.

When conversion is committed by a corporation, the agents and officers of the corporation may also be found personally liable for their active participation in the tort, even though they do not personally benefit thereby. *Bush v Hayes*, 286 Mich 546, 549, 282 NW 239 (1938); *Trail Clinic, PC v. Bloch*, 114 Mich App. 700, 709, 319 NW2d 638 (1982), lv. den. 417 Mich 959 (1983).

In this case, as in *Citizens*, Plaintiff allegedly entrusted funds to Defendants above that which Defendants were entitled to retain. While Plaintiff may have voluntarily allowed Defendants to hold the money in question in connection with the ticket sales operation, Defendants allegedly ultimately retained over \$80,000.00 above what they may have been entitled to retain. Accordingly, the Court is satisfied that Plaintiff may maintain its conversion claim against Defendant Smith as stated pursuant to *Citizens*.

2) Counts IV and V- Gross Negligence and Negligence

In its complaint, Plaintiff alleges that Defendants owed it the legal duty to act prudently and with reasonable care, and to otherwise avoid grossly negligent conduct. Further, Plaintiff alleges that Defendants breached their duties owed to Plaintiff in one or more of the following ways: (a) Recklessly dispossessing Plaintiff of its Ticket Revenues; (b) Allowing the ticket sales from Plaintiff's event to be directly routed to the accounts of DMTCC; (c) Refusing to surrender the ticket revenues to Plaintiff; and (d) Refusing to compensate Plaintiff for its ticket revenue.

The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done. *Osman v Summer Green Lawn Care Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to

the public, of which the plaintiff is a part. *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004). Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may, and frequently does, arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. *Id.*

The *Fultz* Court went on to explain that the appellate courts in Michigan have defined a tort action stemming from misfeasance of a contractual obligation as the “violation of a legal duty separate and distinct from the contractual obligation.” *Id.* at 467. “Misfeasance” is distinct from “nonfeasance” insofar as misfeasance is the act of negligently performing a contractual duty, whereas nonfeasance is not performing a contractual duty at all. *See, Fultz, supra* at 465. The *Fultz* Court determined that a tort action will not lie when based solely on the nonperformance of a contractual duty. *Id.* at 466.

In this case, Plaintiff’s negligence allegations against Defendant Smith are based on his alleged failure to pay the ticket revenues. Accordingly, Plaintiff’s claims sound in nonfeasance rather than misfeasance. As a result, Plaintiff’s negligence claims are barred under Michigan law.

3) Count VI- Fraud/Misrepresentation

In its complaint, Plaintiff alleges that Defendant promised Plaintiff that it would be paid the ticket sales revenue that it would have been entitled to under its contract with DMTTC. An action for fraudulent misrepresentation must be predicated upon a statement relating to a past or existing fact; future promises are contractual and do not constitute fraud. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 338; 247 NW2d 813(1976). However, an exception

to this rule exists where the promise is made in bad faith without the intention to perform it. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378-379; 689 NW2d 145 (2004).

In this case, Plaintiff appears to concede that the representation at issue was that Defendants allegedly promised to pay a portion of the ticket revenue to Plaintiff in exchange for performing the show. Accordingly, the alleged representation was in the form a promise and would ordinarily be barred. However, in its complaint Plaintiff alleges that Defendants made the representation(s) at issue with the intent to damage Plaintiff. Consequently, the Court is satisfied that Plaintiff has sufficiently plead allegations, that if proven, would fall within the exception to the rule set forth in *Hi-Way Motors*. Accordingly, the Court is convinced that Defendant Smith's motion for summary disposition of Plaintiff's fraud claims must be denied.

In addition, to the extent that Defendant Smith contends that Plaintiff's fraud claims are barred as they are interwoven with the alleged contract the Court is convinced that such a position is without merit. The plaintiff must establish a "violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). While it is true that a plaintiff may not recover under both breach of contract and fraud when the alleged fraud is interwoven with the contract, *Huron Tool and Engineering Co., v Precision Consulting Services, Inc.*, 209 Mich App 365; 532 NW2d 541 (1995)(Fraud must be extraneous to the contract in order to cause harm distinct from that caused by the breach of contract), such an argument is premature in this case. Defendants' motion was filed pursuant to MCR 2.116(C)(8) and was filed while discovery was still ongoing. The Court has yet to determine whether a valid and enforceable contract existed between Plaintiff and one or more of the Defendants. MCR 2.111(A)(2) provides that inconsistent claims are not objectionable. In this case, MCR 2.111(A)(2) authorizes Plaintiff to maintain its fraud claims as

alternative claims in the event that the alleged contract is found to be unenforceable. As the Court has yet to find that Plaintiff is entitled to relief in connection with its breach of contract claims, Defendant Smith's contention is premature at this time.

4) Count VII- Unjust Enrichment

With respect to Plaintiff's unjust enrichment claim, Plaintiff's breach of contract claims depend on the jury finding that a contract exists. In contrast, Plaintiffs' claim for unjust enrichment depended on the jury finding that no express contract existed. MCR 2.111(A)(2) permits a plaintiff to plead such inconsistent claims. See also *Keywell and Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002). Should the trier of fact find that there was not a contract, or that the contract is unenforceable, Plaintiff will be able to seek damages under unjust enrichment. Consequently, Defendants' motion for summary disposition of Plaintiff's unjust enrichment claims must be denied.

Conclusion

For the foregoing reasons, Defendant Michael Smith's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Defendant Michael Smith's motion for summary disposition of Plaintiff's negligence and gross negligence claims is GRANTED. The remainder of Defendant Michael Smith's motion is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 4, 2014

JCF/sr

Cc: *via e-mail only*
Pamela Sossi, Attorney at Law, psossi.law@gmail.com
Jason R. Abel, Attorney at Law, jabel@honigman.com
Gary Douglas Merigan, Attorney at Law, gmerigan@meriganlawfirm.com